Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-330

VIJAY V. SATOSKAR, AND ALL OTHERS SIMILARILY SITUATED,
Petitioners,

v.

INDIANA REAL ESTATE COMMISSION, THOMAS DICKSON, EXECUTIVE SECRETARY: WARD DUNCAN, WILLIAM SCHMIDT, CURTIS HUBER, HARLEY SNYDER, WILLIAM LONG, JAMES BIBILYA, DAVID FAIR, CARL MILLER, REX BREEDEN, DON McCULLOUGH, EUGENE McCLAIN, FRED KELLY, WAYNE SMELTZER, MEMBERS OF THE BOARD OF DIRECTORS OF THE INDIANA REAL ESTATE COMMISSION, STATE OF INDIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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Petitioners respectfully pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Decision of the United States Court of Appeals for the Seventh Circuit is presently unreported, but the decision is set out in Appendix A hereto.

JURISDICTION OF THE COURT

The decision of the United States Court of Appeals for the Seventh Circuit was entered on June 2, 1975; and a Motion for Reconsideration and Suggestion of En Banc was denied on July 14, 1975. This Petition for Writ of Certiorari is being filed within ninety days of the decision of June 2, 1975. This Court's jurisdiction is invoked under 28 U.S.A. §1254 (1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit erred in failing to award attorneys' fees based upon the common benefit doctrine.

STATEMENT OF THE CASE

This case was initiated on the authority of a complaint filed on February 22, 1972, for injunctive and declaratory relief challenging the Indiana Statute which precludes aliens from even applying for a real estate license. The suit was brought pursuant to the Civil Rights Statute 42 U.S.C. §1983 and sought the convening of a three-judge court to strike down the unconstitutional state statute barring aliens from obtaining real estate licenses. On April 19, 1972, the District Court filed an entry dismissing plaintiff's class action, money damages count and attorneys' fees. On May 1, 1972, plaintiff filed an interlocutory

appeal to the U.S. Court of Appeals for the Seventh Circuit for a reversal of the District Court's April 19, 1972 entry. On May 19, 1972, the District Court filed an entry abstaining from determining jurisdiction until plaintiff repaired to the Indiana State Courts. After emasculating plaintiff's complaint by eliminating the count for damages, class action and attorneys' fees, the Court ultimately abstained from the case and mandated plaintiff to repair to State Courts. On May 23, 1972, plaintiff filed a Notice of Appeal from both the Judge's April 19, 1972 and May 19, 1972 entries. On June 18, 1973, the Seventh Circuit reversed the District Court's April 19, 1972 order denying class action, damages and attorneys' fees. The Seventh Circuit also reviewed the May 19, 1972 order of abstention and set up a three judge court to decide the case on the merits. The State then appealed the Seventh Circuit decision by Writ of Certiorari to the United States Supreme Court and certiorari was denied. On August 8, 1973, the three judge panel granted partial summary judgment on the constitutional question, issued a declaration that the Indiana statute was unconstitutional and enjoined the enforcement thereof. The three judge Court then remanded to the District Court the issues of damages and attorneys' fees. Since the Indiana statute precluded aliens from even submitting an application to take the real estate exam, there were no records of other aliens who were denied the opportunity to take the test, and therefore, the class action was dismissed and the litigation proceeded as a test case. On January 25, 1974, the Attorney General filed a Notice of Appeal to the Supreme Court from the three judge decision of December 28, 1973. On the 28th of April, 1974, plaintiff filed a Motion to Dismiss or Affirm in the Supreme Court. On June 10, 1974, the Supreme Court entered an Order affirming the decision of

three judge Court, citing In re Griffiths.

On July 29, 1974, the trial before the District Court was held and the Court denied damages and attorneys' fees. From that holding, plaintiff asked for a review before the United States Court of Appeals for the Seventh Circuit on December 31, 1974. On June 2, 1975, following an intervening, peripheral decision by the United States Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, the Seventh Circuit denied relief for the plaintiff. From that denial, the plaintiff requested reconsideration and suggested an en banc rehearing. The motion for reconsideration was denied on July 14, 1975.

REASONS FOR GRANTING CERTIORARI, III

This Court should grant Certiorari in Satoskar v. Indiana Real Estate Commission, ___F.2d___, (C.A.7, 1975), #74-1946, in order to (1) clarify its decision in Alyeska Pipeline Service Co. v. Wilderness Society, ___U.S.___, 95 S.Ct. 1612, 43 L.Ed.2d___ (1975) insofar as it fails to provide clear guidelines in the application of the common benefit exception following the demise of the private attorney general exception, (2) end the threatened dissonance and confusion between the holding of Alyeska and the actions of lower courts, (3) reevaluate the deleterious implications of Alyeska for public interest litigation, and (4) reverse the Seventh Circuit's unjust and unjustifiable decision in Satoskar.

Prior to this Court's decision last term in Alyeska, there existed five generally accepted exceptions to the American Rule prohibiting the award of attorneys' fees: willful non-compliance with a court order, obdurate bad faith pleading, common fund, common benefit, and private attorney general, La Raza Unida v. Volpe, 57 F.R.D. 94

(N.D. Cal., 1972). The last three exceptions represent a continuum of concept initiated in the decision of Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777 (1939).

> Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation--the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree--hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

The broad terms of the language in that opinion were given fuller meaning in this Court's decision in Newman v. Piggie Park Enterprises Inc., 390 U.S. 400, 88 S.Ct. 964 (1968), Mills v. Electric Auto-Lite Company, 396 U.S. 375, 90 S. Ct. 616 (1970), Hall v. Cole, 412 U.S. 1, 93 S. Ct. 1943 (1973). Last term, Alyeska expressly struck down the private attorney general rule, except where Congress explicitly authorized it. In that same opinion, this Court expressly reaffirmed the continued vitality of the common benefit exception, Alyeska, fn. 39, at 1625.

The common fund exception was first expressly enunciated in Sprague. In this decision, it was first recognized that in actions similar to shareholders' derivative actions, the final result of the case accrued to the ultimate good of the defendants as well as the plaintiffs. Consequently, it would be proper to assess the fund

established by the suit to provide for the payment of the successful attorneys' fees. In 1968, the Supreme Court in Newman painted in broad terms the importance of facilitating the use of the courts for the vindication of constitutional rights and the consequent necessity to award attorneys' fees to aid in this effort.

> When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.

A synthesis of these two concepts first occured in Mills, in which the common fund exception to the American Rule was extended to the award of attorneys' fees in those cases where the final result provided an identifiable benefit which was to the ultimate good of the defendant. One result of this decision was that many of the circuit and district courts of the federal judiciary went one step further and combined the result of Mills with the dictum of Newman and the liberal private attorney general doctrine appeared, e.g. National Resource Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (C.A.1, 1973). The private attorney general exception to the American Rule was initially utilized in cases where a strong Congressional policy was being implemented. In other words, the ultimate beneficiary was the United States and its citizens, and they should aid in covering the expenses of this effort.

Eventually, the phrase "strong Congressional policy" became virtually synonymous with almost any Constitutional right or privilege. In Hall, the Supreme Court explicitly refused to either endorse or reject this approach, choosing rather to further refine the common benefit doctrine. The silence of the Court concerning private attorney general came to an end in Alyeska. There, this Court held that only the four other judicially created exceptions to the American Rule were valid, specifically eliminating the private attorney general doctrine.

The private attorney general doctrine can be viewed as a logical extension of the basic concepts of the common benefit exception, National Resource, at 1333-1334. Just as the common benefit rule allows an award of fees when the result of the suit is to provide a substantial benefit to the ultimate beneficiaries, the defendants, the private attorney general rule allowed an award of fees when the result of the suit was to provide a substantial benefit (i.e. the vindication of a strong Congressional policy) to the ultimate beneficiaries generally characterized as the general citizenry. Moreover, the lack of precise requirements for qualifying as a private attorney general made it a favored instrument of crusading counsels and activist jurists. The glib popularity of the private attorney general doctrine contributed to its demise. The obvious appeal of acting as a private attorney general substituted for judicial evaluation of the strength of the Congressional policy and the depth of the benefit conferred by the vindication of that constitutional right. Concommitantly, on the more staid end of the fee award scale, common benefit fell into general disuse.[1]

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1 The best evidence of the relative use of the

These circumstances have resulted in lack of understanding and consequent confusion in the lower courts as to the state of the common benefit exception following Alyeska, even as it reaffirmed the language of Hall, Alyeska, fn. 39 at 1625. A result of this confusion has been the Seventh Circuit's action in Satoskar. The primary difficulty lies in the establishing of guideposts as to what benefits achieve the threshold quality level to meet the necessary requirement of substantiality.

In Hall, a union member was excluded from his union for "villifying" a union official. The court affirmed the liability of the union and then went on to award attorneys' fees, based upon the common benefit exception. It did so by determining that the suit had conferred a substantial benefit to the defendant union by contributing to the furtherance of free speech within the union, Hall, at 1948.

In a strikingly similar case, Bright v. Philadelphia-Baltimore-Washington Stock Exchange, 327 F. Supp. 495 (E.D. Pa., 1971), a stock exchange member was found to have been wrongfully excluded from participation within the organization's

two exceptions (common benefit and private attorney general) is that in the period from the time of the Mills decision until the time of the decision in Alyeska, one of the circuits awarded fees based upon common benefit, Merola v. Atlantic Richfield, 515 F 2d 165 (C.A. 3, 1975), while private attorney general was utilized in, at least six: Hoitt v. Vitek, 495 F. 2d 219 (C.A. 1, 1974), Lee v. Southern Home Sites, 444 F 2d 143 (C.A. 5, 1961), Taylor v. Perini, 503 F 2d 899 (C.A. 6, 1974), Donahue v. Stauton, (C.A. 7, 1972), Fowler v. Schwartzwalder, 498 F. 2d 143 (C.A. 8, 1974), Brandenburger v. Thompson, 494 F. 2d 885 (C.A. 9, 1974).

structural election. That court awarded attorneys' fees, based upon the common benefit exception. It did so by determining that the suit had conferred a substantial benefit to the defendant stock exchange by contributing to the responsiveness of the intraorganizational governing institutions of the exchange, Bright, at 506.

In Satoskar, Indiana had a statute which prohibited the entry of aliens into that state's real estate profession. Vijay Satoskar, in an effort to eliminate the unfair statute, took the licensing entity to Court. This Court granted summary affirmance to the decision of three judge panel which struck down the Indiana statute, leaving the matter of fees and damages to the lower courts.

The ultimate beneficiary in Satoskar is both small and easily identifiable, Alyeska, fn. 39 at at 1625. It is the Indiana Real Estate Commission and the agents that it licenses. The Indiana Real Estate Commission is no longer shackled by an unconstitutional law and, consequently, is enabled to increase the quantity of qualified real estate agents in Indiana. In being able to do so, the Indiana Real Estate Commission and the agents can more completely fulfill their functions and thus broaden their competency, esteem, and base within the state.

Thus, in each of these cases, a basic paradigm of law exists. A single-interest service organization is involved in each case. A member of each organization, after being wrongfully excluded, took their organization to court to remedy the situation. The union violated the United States Constitution, the stock exchange violated its by-laws, and the Indiana Real Estate Commission violated the United States Constitution. Each violation served to exclude a person from a position within the organization. The resolution of the two prior cases (Hall

and Bright) against the respective organizations was found, by the courts, to be for the ultimate benefit of the organization. A fortiori, then, as the ultimate benefit in Satoskar belongs to the organization, the Indiana Real Estate Commission; this is a case where the common benefit doctrine, as set out in Hall and Alyeska, ought rightfully to apply.

Contrary to these results, the Seventh Circuit in Satoskar ignored the holdings of Sprague, Mills, Hall and Alyeska and refused to even reach beyond the fees' question. In doing so, it held that,

> There is no effective way in the instant case to levy fees against a benefited class...Any benefit to resident aliens of Indiana is merely theoretical and not reducible to monetary figures.

In that short passage the Appeals court succeeded in truncating the Alyeska requirement of a "small and easily ascertainable class" of beneficiaries, Alyeska, fn. 39 p. 1625, by distorting the common benefit doctrine by confusing the plaintiffs with the benefited party and thus undermining the entire retaionale of fee-shifting, which is basic to common benefit, Mills at 625. Moreover, it effectively negates Mills, Hall, and Alyeska by requiring a monetary benefit, while the above cases all hold that the benefit accrued need not be monetary in nature. Alyeska specifically upheld both common fund and common benefit exceptions to the American Rule, fn. 39 p. 1625.

Pro bono publico has always permitted fees at scaled down per hour figures. Where an anti-trust or securities lawyer could expect from $50-$100 per hour for winning, the constitutional lawyer is faced with the bleak prospect that if he

gets far-reaching reform for his client in a tough case, he gets a slap on the back and no money, but if he rejects the reform and goes for a money settlement, he may be compensated, despite the sacrifice of constitutional principles. In the real world, it is unfair to place any citizen in that position. The language of this decision in Satoskar places an excruciating chilling effect upon the workings of a society that is accustomed to utilizing the legal system as a means to curb unjust laws and further the principles and ideals of our founding fathers.

It is axiomatic to the lay public that the operation of justice in the United States mandates courts that are equally available for all. In an ideal sense, this remains true. Any person may file in the courts of the country. Yet, especially in suits which concern complex questions of law, such as this one, it is necessary to have a lawyer. Attorneys cost money. If the ability of constitutional litigants to obtain fees from the other side is further abrogated, even in victory, then the court system will have made a conscious decision in favor of stare decisis over the rights and interests of all the citizens of the nation.

What has occurred in the latest decisions has been a blurring of the fact that while three of these exceptions to the American Rule share a common heritage and thus have some similarities, that each exists as an independent entity and that the subsequent reduction of one of the exceptions does not reduce any of the other exceptions' essential qualities, except insofar as it partakes of the forbidden entity. The crucial decision then becomes one of determining the degree, if any, of overlap between the allowed and the unallowed, common benefit and private attorney general.

If the effective emasculation of the common

benefit exception to the American Rule by the Seventh Circuit is allowed to stand, that decision can have but one result on the pursuit of justice in this society. If people could exist in society without having to "pay" their way, the issue of attorneys' fees would be of no import. However, it is necessary for people to have money to survive in our society. Consequently, attorneys are being presented with a Hobson's choice by the Satoskar decision, even more so than that provided by the language of Alyeska. If the attorney chooses reform he loses his chance for compensation. If he settles for money out of court, he loses the opportunity to achieve real reform.

The devastating impact of this decision lies, not as much with the attorneys, for if an attorney is deprived of his pro bono work he will find paying clients elsewhere, but with the people who now will be unable to obtain competent counsel in their efforts to vindicate constitutional rights. As result of this opinion, constitutional litigants will lack competent counsel for the fact that a lawyer cannot live on righteousness alone. Consequently, the ultimate loser from the end of the common benefit exception will be the citizen who is unable to afford the costs inherent in obtaining competent counsel in a complex constitutional case and the lengthy ensuing court battle. Thus, the equal access to the courts of justice, which every American schoolchild knows to be true, will only be true in school. For in the federal courtrooms, unless the onerous effects of the Satoskar decision are rectified, only the wealthy will have the fair and just access to the courts to which all Americans are entitled.

Another basis for granting Certiorari was the erroneous application of the bad faith pleadings exception to the American Rule. The tendency of deep-pocket defendants, such as the Indiana Real

Estate Commission, to prolong the appeals process beyond the point of reasonableness in an effort to outlast the less endowed party to the litigation is a practice which is patently unjust. Especially in a situation such as this, where an on-point authority, In re Griffiths, 413 U.S. 717, clearly controlled. The Indiana Real Estate Commission took a direct appeal to this court from the findings of the three-judge panel, arguing that there was a substantial federal question of equal protection in that Espinoza v. Farah Manufacturing Co., 94 S.Ct. 334 (1974) tempered the holding of In re Griffiths. In an earlier writ, the Commission unsuccessfully argued that abstention was proper in that despite In re Griffiths, there was no constitutional issue involved in alien licensing.

If an alien can practice law, an alien can surely obtain a real estate license. The Indiana Real Estate Commission cannot provide a legitimate basis for pressing that appeal to this Court. This Court in a summary affirmance agreed with the lower panel and cited In re Griffiths as its whole opinion. The repeated and dilatory appeals accomplished only one objective, it delayed plaintiff's right to obtain a license. While the courts are always open to legitimate legal challenges, judicial economy would dictate that frivolous appeals brought by parties with unequal financial resources be deterred. Therefore an award of counsel fees would further the policy of judicial econometrics by discouraging bad faith appeals in such situations.

The misapplication of the common benefit doctrine in Satoskar is merely symptomatic of the confusion which currently reigns in the lower courts following Alyeska, see Townsend v. Edelman, ___F.2d ___, (C.A.7, 1975), #73-1960 & #73-1961 and Samuel v. University of Pittsburgh, ___F.Supp.

___, (D.C., W.Pa., 1975). This confusion will heighten further in the days ahead as attorneys across the country scramble to obtain recompense for their efforts in the broad range of cases affected, from shareholders' derivative suits to 42 U.S.C. 1983, civil rights actions.

The Supreme Court has a responsibility to establish viable criteria for the assessment of the award of attorneys' fees in litigation of common concern. A balancing test should be forged that awards fees based upon a substantial common benefit conferred and denying fees where the rights vindicated are more personal in nature. Affirmative action by this Court is necessary to create order where confusion currently reigns in determining whether an award of counsel fees is justified in public interest litigation.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be granted to review the decision of the Seventh Circuit of Appeals for the Seventh Circuit.

Respectfully submitted,

Mr. Daniel Friedland

Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED APRIL 9, 1975
DECIDED JUNE 2, 1975

Before Pell, Stevens, and Tone, Circuit Judges

Tone, Circuit Judge: The issue in this appeal is whether the District Court properly denied a request for the awarding of attorneys' fees against the State and Indiana and state officials who were defendants in their official capacities. In the underlying suit, plaintiff was successful in challenging the constitutionality of the Indiana statute precluding aliens from applying for or obtaining real estate licenses, but did not prevail on the class and damages aspects of the case.

The history of the case was this: A single judge abstained from deciding the constitutional question, but his decision was reversed and remanded for the convening of a three-judge court, 478 F.2d 1405 (7th Cir., 1973), cert. denied 414 U.S. 1004 (1973). On remand, the statute was declared unconstitutional, and the Supreme Court summarily affirmed, citing In re Griffiths, 413 U.S. 717 (1973), 417 U.S. 938 (1974). The case then proceeded to trial before a single judge on the issues of damages and attorneys' fees. On September 11, 1974, in the order now before us, the District Court denied both damages and fees.

The District Court denied the request for fees on the ground that the Eleventh Amendment

bars any monetary recovery against the state, and, since the officials are defendants in their official capacities only, any award against them would be, in effect, an award against the state. We affirm the judgment but do so without reaching the Eleventh Amendment question.

Plaintiff recognizes the American Rule that the prevailing party is not ordinarily entitled to recover his attorneys' fees from the losing party but argues that his case comes within several judicially created exceptions to that general rule: (1) that by securing injunctive and declaratory relief he has conferred a common benefit on a group of people whose constitutional rights had been violated: (2) that he has acted as a private attorney general in effectuating a strong Congressional policy: (3) that he should receive attorneys' fees based on "this Court's inherent equitable power to shift the attorneys fees to defeated defendants in 1983 actions": and (4) that defendants have acted obstinately and in bad faith in "pursuing frivolous appeals". Plaintiff further argues that the Eleventh Amendment, contrary to the conclusion of the District Court, does not bar recovery of attorneys' fees from the state or state officials being sued in their official capacities.

Since oral argument in this case, the Supreme Court has held in Alyeska Pipeline Service Co. v. The Wilderness Society, ___U.S. ___, 43 U.S.L.W. 4561, 4568 (1975), that in the absence of express statutory authority the federal courts do not have inherent judicial power to award fees based on the "private attorney general" approach or on their views as to the social importance of the policy underlying the statute under which the plaintiff sues. Thus, plaintiff's second and third arguments have been conclusively rejected by the Supreme Court. The Court also noted the limits of

the "common fund and common benefit" justification for awarding fees; that in all the cases upholding awards on that basis, "the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting."...U.S. at n.39, 43 U.S.L.W. at 4569, n. 39. There is no effective way in the instant case to levy fees against a benefited class for the reasons that presumably led the District Court to reject the class and damages allegations of the complaint: Any benefit to resident aliens of Indiana is merely theoretical and not reducible to monetary figures: the class suffers problems of indefiniteness: and thus the means of identifying either benefit or class with requisite accuracy are lacking. To assess attorneys' fees against the state is inappropriate because that would impose a share of the cost on all citizen taxpayers and not just on the aliens directly benefited. If it is to be asserted that all citizens have in fact benefited from the vindication of constitutional principles, the "common benefit" theory would merge into the "private attorney general" approach, which as we have said has been rejected by the Court in Alyeska Pipeline.

There remains the question of whether there was "bad faith" on the part of the state or its officials that would justify a fee award. The standards for bad faith are necessarily stringent. Compare Sims v. Amos, 340 F.Supp. 691, 693-694 (M.D. Ala. 1972), aff'd. 409 U.S. 942 (1972), with Donahue v. Staunton, 471 F.2d 475, 482-483 (7th Cir. 1972), cert, denied 410 U.S. 955 (1973), and see discussion of the two in Alyeska Pipeline, ___ U.S. at ___n. 46, 43 U.S.L.W. at 4571, n. 46. The prosecution of timely appeals on the merits of a case does not show bad faith, especially where, as here, the defendants were acting on the advice of

the state Attorney General, who represented them throughout the course of this litigation and where the issue involved had been the subject of an intervening Supreme Court decision (In re Griffiths, supra, 413 U.S. 717) which was not on all fours with the instant case. We have been referred to no evidence that would support a finding that the appeals were taken in bad faith.

As a result of our conclusion that no proper basis existed on which the District Court could have justified an award of fees, we affirm the order denying fees without reaching the question whether the Eleventh Amendment precludes an award of fees against the state or its officials.* This

* The disagreement among the circuits on this question is described but not resolved in footnote 46 of the Alyeska Pipeline opinion, ___U.S. at ___ n. 46, 43 U.S.L.W. at 4571 n. 46. It should also be noted that there is an intra-circuit split in both the Fifth and Sixth Circuits: compare Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), petition for cert. filed 43 U.S.L.W. 3240 (U.S. Oct. 9, 1974) (No. 74-403), with Milburn v. Hueker, 500 F. 2d 1279, 1282 (6th Cir. 1974), and see Taylor v. Perini, 503 F.2d 899, 911-912 (6th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3281 (U.S. Oct. 30, 1974) (No. 74-506): and compare Gates v. Collier, 489 F.2d 298 (5th Cir. 1973), rehearing en banc granted, 500 F.2d 1382 (1974) and Norman v. Alabama, 503 F.2d 1320, 1321 n.1 (5th Cir. 1974) (hearing en banc on the issue of attorneys' fees) with Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 496 F.2d 1017, 1025-1026 (5th Cir. 1974), rehearing en banc granted, 496 F.2d 1026 (1974). Petitions for certiorari are pending in three cases, Jordon v. Gilligan and Taylor v. Perini, as noted above, and Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3296 (U.S. Nov. 8, 1974) (No. 74-558).

result is in accord with that reached in Townsend v. Edelman (Nos. 73-1960, 73-1961, June 2, 1975), decided this day by another panel of this court.

AFFIRMED

Supreme Court, U. S.
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IN THE

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October term, 1975

NO. 75-330

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October term, 1975

NO. 75-330

VIJAY V. SATOSKAR, and All Others
Similarly Situated,

Petitioners,

—vs—

INDIANA REAL ESTATE COMMISSION;
THOMAS DICKSON, EXECUTIVE SECRETARY;
WARD DUNCAN, WILLIAM SCHMIDT, CURTIS
HUBER, HARLEY SNYDER, WILLIAM LONG,
JAMES BOBILYA, DAVID FAIR, CARL MILLER,
REX BREEDEN, DON McCULLOGH, EUGENE
McCLAIN, FRED KELLY, WAYNE SMELTZER,
MEMBERS OF THE BOARD OF DIRECTORS OF
THE INDIANA REAL ESTATE COMMISSION;
STATE OF INDIANA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Indiana Real Estate Commission; Thomas Dickson, Executive Secretary; Ward Duncan, William Schmidt, Curtis Huber, Harley Snyder, William Long, James Bobilya, David Fair, Carl Miller, Rex Breeden, Don McCullogh, Eugene McClain, Fred Kelly, Wayne Smeltzer, Members of the Board of Directors of the Indiana Real

Estate Commission; and State of Indiana, respectfully pray this court to deny issuance of a writ of certiorari, and to affirm the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in *Satoskar v. Indiana Real Estate Commission,* (7th Cir., 1975) 517 F.2d 696.

OPINION BELOW

The opinion of the Seventh Circuit is reported as *Satoskar v. Indiana Real Estate Commission* (7th Cir., 1975) 517 F.2d 696, and has been appended to the Petition for Writ of Certiorari as Appendix A. The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereafter District Court), entered on September 11, 1974, has not been reported at this time, but has been appended to this Brief in Opposition at pages A-1 through A-5. The Partial Judgment of the Three Judge District Court has not been reported but is appended hereto at pages A-7 through A-11.

JURISDICTION

Petitioner alleges jurisdiction in this Court "under 28 U.S.A. [sic] § 1254 (1)." However, Petitioner has not shown this Court which of the applicable paragraphs of Rule 19 of the Rules of this Court apply to the Petition for Writ of Certiorari (hereafter Petition).

The Respondents would assert that there is no jurisdiction in this Court to issue the writ prayed for since there is no federal question involved and since no descision was issued in conflict with applicable decisions of this Court.

QUESTION PRESENTED FOR REVIEW

The respondents would assert that the issue presented to this Court is:

1. Whether the Seventh Circuit erred in affirming the District Courts' denial of fees to Petitioner's attorney?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

I.

Nature of the Case

This petition, filed by Plaintiff below, arises from a case where the Seventh Circuit affirmed the District Court's denial of a request for an award of attorney fees

to Petitioner's attorney in a case brought pursuant to 42 U.S.C. §1983.

II.

Course of Proceedings Below

Plaintiff filed his "Complaint for Declaratory Judgment, Injunctive Relief and Damages" as an alleged class action on February 22, 1972. Said complaint was researched, drafted and filed by the Indiana Civil Liberties Union, seeking relief under 42 U.S.C. § 1983.

On February 24, 1972, the Defendants (Respondents herein) filed a Motion to Dismiss with supporting Memorandum asserting: the Absention Doctrine; that the complaint failed to state a claim upon which relief could be granted; and that the Complaint, as filed, violated the Ninth, Tenth and Eleventh Amendments to the Constitution of the United States. On March 2, 1972, Defendants filed a "Supplemental Memorandum in Support of Motion to Dismiss Under the Doctrine of Abstention."

On March 9, 1972, Plaintiff amended his complaint to change the damage count from One Hundred Thousand Dollars ($100,000.00) "to reasonable damages for the class." Also on March 9, 1972, the Plaintiff filed his "Reply to Defendants Supplemental Brief on Abstention Encompassing Recent Circuit Court Cases."

On April 19, 1972, the District Court entered its "Entry" dismissing the class action, denying Plaintiff's motion for temporary restraining order, granting Defendant's motion to dismiss in part by dismissing the claim for money damages, costs and reasonable attorney's fee, and took the abstention argument under advisement. The District Court entered an order on May 19, 1972, abstaining from deciding

the merits of the case until the Indiana State Courts had considered the issue.

On appeal, The Seventh Circuit, on May 24, 1973, held that the District Court should not have abstained, stated that the constitutional question presented was substantial, and remanded the case to a three-judge district court for consideration of the constitutional question and the issues of the class action, damages and attorney fees. 478 F.2d 1405. Certiorari was denied on November 5, 1975. 414 U.S. 1004 (1973), 94 S. Ct. 361 (1973).

On September 18, 1973, Plaintiff filed his "Petition for Summary Judgment and Attorney's Fees," in the District Court, and on September 21, 1973, filed his "Proposed Findings of Fact" and "Fee Affidavit."

On November 9, 1973, Defendants filed their Memorandum in Opposition to Plaintiffs Motion for Summary Judgment," "Defendants' Brief on Propriety of Attorneys' Fees to Plaintiffs," and "Motion to Deny Class Action" with supporting "Memorandum."

On December 28, 1973, the three-judge Court granted partial judgment to Plaintiff declaring that the statute in question was unconstitutional. The Court then granted the Defendants' motion to deny class action, dissolved the three judge court and remanded the case "to the assigned single Judge DISTRICT Court for determination of the remaining issues," i.e., damages and attorneys fees. A-11.

Defendants filed their "Answer" in the District Court on January 17, 1974. On January 25, 1974, the Defendants filed their "Notice of Appeal to the Supreme Court of the United States," and the Three-Judge District Court's opinion was affirmed by this Court on June 10, 1974. 94 S. Ct. 2062 (1974).

The single judge District Court set the remaining issues for trial on July 29, 1974. On or about July 18. 1974, Plaintiff filed a "Motion for Trial by Jury" which the Court denied on July 19, 1974. Plaintiff then filed a "Motion to Remove Judge Under Rule 23" which was denied on July 23, 1974. A Trial was held on July 29, 1974, and on that date the Defendants filed their Pretrial Brief. On September 11, 1974, the District Court issued its "Special Findings of Fact, Conclusions of Law, and Judgment" which is appended hereto at pages A-1 through A-5.

Plaintiff filed his Notice of Appeal to the Seventh Circuit from the District Court's denial of the request for an award of attorney fees, but did not contest the denial of damages. Following oral argument on April 9, 1975, the Seventh Circuit issued its opinion on June 2, 1975.

The Plaintiff then filed several documents in the Seventh Circuit that were not served upon Defendants or their counsel. Included in those documents was a Petition for Rehearing with a suggestion of rehearing *en banc*. That petition was denied on July 14, 1975.

III.

Facts Relevant to Issues Presented for Review

The facts pertaining to this portion of the appeal are contained in the District Courts' "Special Findings of Fact, Conclusions of Law, and Judgment" appended hereto at pages A-1 through A-5. The facts relevant to the issue of attorney fees, as stated by the District Court, are as follows:

> "8. Mr. Satoskar sought a real estate license to supplement his income, but had no arrangements to go into the private real estate business.
>
> • • •

> 11. In the summer of 1971, Mr. Satoskar formed Geo-Services, Inc. and has since that time spent all of his working time as President of said corporation.
>
> • • •
>
> 14. Mr. Satoskar testified that the primary reason he seeks a real estate license is to enable him to secure leases on land for possible oil and/or gas exploration for Geo-Services, Inc. at a substantially reduced price which he could not receive if he approached the owners of said land in his professional capacity as a geophysicist or as President of Geo-Services, Inc."

In addition to the above facts, on December 28, 1973, the three-judge district court convened in this matter, granted partial judgment to the Plaintiff (Petitioner herein) declaring the statute in question was unconstitutional. The Court then granted the defendants' motion to deny class action, dissolved the three-judge court and remanded the case "to the assigned single Judge DISTRICT Court for determination of the remaining issues," i.e., damages and attorney fees. A-11.

REASONS FOR DISALLOWANCE OF THE WRIT

I.

THE SEVENTH CIRCUIT DID NOT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF ATTORNEY FEES TO PETITIONER'S ATTORNEY

A.

The American Rule and the Seventh Circuit

The Seventh Circuit held ". . . that no proper basis existed on which the District Court could have justified an award of fees . . ." 517 F.2d at 698.

The law as to attorney fees in the Seventh Circuit is set out in *Walker v. Columbia Broadcasting System, Inc.*, (7th Cir., 1971), 443 F.2d 33, where that Court said at page 35:

> "The fundamental rule both in the federal and state courts is that ordinarily the attorneys' fees of another party are not chargeable against a litigant unless a particular statute or an agreement between the parties so provides. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717-718, 87 S.Ct. 1404, 18 L.Ed.2d 475; *In re Joslyn*, 7 Cir. 224 F.2d 223, 225; *Smoot v. Fox*, 6 Cir., 353 F.2d 830; *Ritter v. Ritter*, 381 Ill. 549, 553, 46 N.E.2d 41; *Child v. Lincoln Enterprises, Inc.*, 51 Ill. App.2d 76, 83, 200 N.E.2d 751.
>
> In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, p. 717, 87 S. Ct. 1404, p. 1406 the Court, after referring to the contrary practice in the courts of England, stated:
>
> > 'Although some American commentators have urged adoption of the English practice in this county, our courts have generally resisted any movement in that direction. The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefore.' "

The Court then noted that there are "limited exceptions" to the American rule which may be summarized as follows

1. Admiralty cases
2. Civil contempt cases
3. "Common fund" or derivative cases
4. A variation of the common fund cases involving a type of quasi-collateral estoppel.

Regarding these exceptions, the Seventh Circuit concluded at page 36, that:

> "All of the above exceptions involve situations where the Court deemed 'overriding considerations of justice' to compel such a result."

Rule 54(d) of the Federal Rules of Civil Procedure deals with the recovery of costs in a lawsuit. As the Seventh Circuit said in *Walker v. Columbia Broadcasting System, Inc., supra,* at page 37:

> ". . . But Rule 54(d) deals only with 'costs', and in *Fleischmann, supra,* it was definitively stated (386 U.S. at p. 720, 87 S. Ct. at page 1408):
>
> > "• • • (W)ith the exception of the docket fee provided by 28 U.S.C. § 1923(a), the statutory definition of the term 'costs' does not include attorney's fees, • • •"
>
> We are of the opinion that the discretionary power granted by Rule 54(d) pertains to the alloting of authorized costs as between the parties, but does not embrace the awarding of attorneys' fees as such."

Therefore, attorney's fees should only be allowed if there is specific statutory authorization for those fees, or if the case is extraordinary and would fall into one of the "limited exceptions".

The cases that fall into the exceptions to the general rule are primarily stockholder's derivative actions, where the corporation receives a substantial benefit from the action by the stockholder, *Bosch v. Meeker Cooperative Light and Power Association,* 101 N.W.2d 423 (1960), or where there has been deliberate, oppressive action by some party. Cases in this latter group include: *Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967) for deliberate patent infringement activities; *Griffin v. County School Board of Prince Edward County, Virginia* (4th Cir., 1966), 363 F.2d 206, a civil contempt action regarding the

disbursement of public funds to private segregated schools while the right to do so was being appealed to the Court of Appeals; and *Rolax v. Atlantic Coastline Railroad Co.*, (4th Cir., 1951) 186 F.2d 473, concerning a charge of racial discrimination against a union by black railroad firemen.

B.

The Common Benefit Exception

The Petitioner argues here that attorney fees should have been awarded on the basis of the "common benefit exception" to the traditional rule which denies an award of attorney fees. In discussing the "common benefit Exception", Petitioner states, at pages 5 of 6 of his Petition that:

> ". . . Consequently, it would be proper to assess the fund established by the suit to provide for the payment of the successful attorneys' fee . . ."

In the case at bar, there was no such "fund" established. The case had one lone plaintiff who was denied damages. A-4. In addition, the class action aspect of the case was denied by the three-judge district court. A-11.

Furthermore, it is doubtful that Petitioner was really seeking to advance the "public interest" as suggested by the passage quoted by Petitioner on page 6 of the Petition. The testimony of the Petitioner in the District Court was that he sought the real estate license to enable him to get leases on land for oil and gas exploration at a rate substantially reduced over that which he would have to pay if he approached the land owners as a geophysicist. See Finding of Fact No. 14, A-3. Therefore, the Petitioner had a very strong financial interest in the outcome of the lawsuit.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 95 S. Ct. 1612 (1975), this Court disposed of the "private attorney general" concept for the award of attorney fees. Further in that case at note 39, 95 S.Ct. at 1625, this Court stated:

> ". . . In this Court's common fund and common benefit decisions, the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting . . ."

In this case, however, such an analysis will result in the denial of the request for the award of attorney fees. Petitioner attempts to bring this case within the common benefit exception by stating on page 9 of the Petitioner that "the Indiana Real Estate Commission and the agents that it licenses" are the ultimate beneficiaries. The Respondents would submit that the Petitioner is simply grasping for a way to put himself within the common benefit exception, and there is no way he can accomplish his purpose.

The principle behind the common benefit exception is to spread the costs of litigation to those persons benefitting from such litigation. Here the only identifiable person benefitting from the litigation is the Petitioner, Vijay V. Satoskar, since the class action aspect of the suit was denied and, as stated above, no "fund" was created upon which anyone could draw.

Petitioner states that the Seventh Circuit misapplied the common benefit exception and was confused following this Court's decision in *Alyeska, supra.* In support of that state-

ment, Petitioner cites *Townsend v. Edelman,* (7th Cir., 1975) 518 F.2d 116. However, in that case, the Seventh Circuit specifically stated, at page 123:

> "Other rationales for the awarding of attorneys' fees in the absence of statutory authorization that remain viable in light of *Alyeska Pipeline Service (Id.* at —, 95 S.Ct. 1612) are inapplicable to the case at hand. Although Mr. Justice Marshall in dissent argued for an expanded view of the "common benefit" theory (*Id.* at —, 95 S.Ct. 1612) the *Alyeska Pipeline Service* majority pointed out that in the Court's common fund and common benefit decisions, "the class of beneficiaries was small in number and easily identifiable." *Id.* at —, 95 S.Ct. at 1625 n. 39 In the present case plaintiffs did not press their claim for attorneys' fees on this rationale undoubtedly because there existed an open-ended group of beneficiaries with no distinct pool of funds created by the litigation which was allocable to the entire class, as opposed to being allocable to the public as a whole, upon which the plaintiffs who prosecuted this suit could draw. *See generally* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-97, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970). In this situation the traditional common benefit or fund rationale is inappropriate *See* Satoskar v. Real Estate Commission, 517 F.2d 696 (7th Cir. 1975)."

That statement is not the statement of a confused court and the denial of attorney fees was proper.

C.

The Eleventh Amendment

The Respondents would submit that attorney fees were not chargeable against them in this case for several other reasons. One of those reasons would be due to the applicability in this cause of the Eleventh Amendment to the Constitution of the United States.

The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Any recovery of attorneys fees by the Petitioner would not come from the Respondents, who were merely nominal parties, but would come from the State Treasury. As this Court said in *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459, 65 S. Ct. 347, 89 L.Ed. 383 (1945), at page 464:

> "... When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants" (cases omitted).

This statement was cited with approval in the case of *Edelman v. Jordan,* 94 S. Ct. 1347, 1356 (1974), where this Court stated:

> "... Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." (Citing cases).

In the case of *Jordan v. Gilligan,* (6th Cir., 1974) 500 F.2d 701, cert. denied 95 S.Ct. 1996 (1975), the Sixth Circuit stated the issue at page 705:

> "Stripped of the distracting shadow questions, the case before us presents a singular, although by no means simple, issue: Does a federal court have the power to award attorneys' fees against a state or its officials acting in their official capacities in a suit brought under 42 U.S.C. § 1983 to vindicate constitu-

tional rights? To this inquiry we must respond in the negative."

The Sixth Circuit further stated at page 709:

> "Careful study of the *Edelman* opinion leads us to conclude, as did the Third Circuit, that the Eleventh Amendment prohibits the awarding of attorneys' fee against unconsenting sovereign states. We note in particular the following language from that opinion: 'Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.' *Edelman, supra,* 94 S.Ct. at 1356. Although appellees urge that attorneys' fees are analogous to costs, the taxing of which is permitted against states, the test for determining whether a particular type of relief passes muster, as set out in *Edelman*, indicates the opposite. The Amendment bars any award which is 'measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.' *Edelman, supra,* 94 S.Ct. at 1358. In our opinion, awards of attorneys' fees fall within that classification and are, therefore, barred."

Thus, the Respondents would assert that any award of attorney fees to Petitioner is barred by the Eleventh Amendment.

D.

The State is not a Person

Attorney's fees in this case brought pursuant to 42 U.S.C. § 1983 must fail for another reason. It is well settled that the State and the Commission are not "persons" under 42 U.S.C. § 1983 and, therefore, are not subject to money damages. See *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Jaso v. Traczyk,* (D.C.N.D. Ind., 1973) 367 F. Supp. 434, 436; *Paige v. Pennsylvania,* (D.C. Pa., 1970) 311 F. Supp. 940.

It is quite evident here that this was a suit against the State. The District Court found in paragraph 16 of its Findings of Fact that:

> "There are no allegations in Plaintiff's Complaint of individual liability on the part of either the executive secretary of the Indiana Real Estate Commission or the members of said Commission." A-3.

In addition, the action complained of was action taken by the Commission as a Commission. The individual members of the Commission could not have taken any action which would have deprived Plaintiff of any of his rights. Further, the State of Indiana was a named Defendant in the District Court. Therefore, attorney fees could not be charged to the State in this § 1983 action.

E.

The State Was Not Guilty Of Obdurate Obstinacy

The statute in question in this case was enacted in 1949, and had never been challenged in any other legal proceeding. Petitioner stated that his motion for summary judgment in the District Court was based upon *In re Griffiths,* 93 S.Ct. 2851 (1973), a case decided by this Court on June 25, 1973. However, the Complaint was filed on February 22, 1972, some sixteen (16) months prior to *In re Griffiths supra.* The Respondents would submit that there was no mandate for the State to instantly change the statute upon the filing of the Complaint as is shown by the Order of the Seventh Circuit dated May 24, 1973:

> "We conclude that abstention was improper in this case. The district court order of May 19, 1972, is vacated and the case is *remanded with directions to con-*

> *convene a three-judge court* pursuant to 28 U.S.C. § 2281 and 2284. The *constitutional question raised in this complaint is plainly substantial . . .*" (Emphasis added.)

That Court did not remand the case to the District Court to enter judgment for Petitioner, but to convene a three-judge court and to hold further proceedings. Thus, the action by the Respondents cannot, under any stretch of the imagination, be termed "obdurate obstinacy."

The Respondents did in fact take an appeal from the decision of the Three-Judge District Court issued on December 28, 1973, even though *Griffiths* had been issued earlier. On that appeal the Respondents asserted that *Griffiths* had been tempered by this Court in the case of *Espinoza v. Farah Mfg. Co.*, 94 S.Ct. 334 (1973). That appeal was subsequently denied. 417 U.S. 938 (1974); 94 S.Ct. 3062 (1974).

The Seventh Circuit fully considered Petitioner's allegations of "bad faith" and stated that "[t]he standards for bad faith are necessarily stringent." 517 F.2d at 698. The Court further stated on that same page that:

> ". . . The Prosecution of timely appeals on the merits of a case does not show bad faith, especially where, as here, the defendants were acting on the advice of the state Attorney General, who represented them throughout the course of this litigation, and where the issue involved had been the subject of an intervening Supreme Court decision (In re Griffiths, supra, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910), which was not on all fours with the instant case. We have been referred to no evidence that would support a finding that the appeals were taken in bad faith."

Based upon all of the above, the Respondents would assert that the Seventh Circuit properly affirmed the District

Court's denial of Petitioner's request for an award of his attorney's fee.

CONCLUSION

For these reasons, the Petition for a writ of certiorari to review the judgment and order of the Seventh Circuit should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIJAY V. SATOSKAR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. IP 72-C-82
	)	
INDIANA REAL ESTATE COMMISSION: THOMAS DICKSON, EXECUTIVE SECRETARY, WARD DUNCAN, WILLIAM SCHMIDT, CURTIS HUMBER, HARLEY SNYDER, WILLIAM LONG, JAMES BOBILYA, DAVID FAIR, CARL MILLER, REX BREEDEN, DON McCULLOGH, EUGENE McCLAIN, FRED KELLY, WAYNE SMELTZER, MEMBERS OF THE BOARD OF DIRECTORS OF THE INDIANA REAL ESTATE COMMISSION: AND THE STATE OF INDIANA.	)	
	)	
Defendants.	)	

"SPECIAL FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND JUDGMENT"

This cause came on for trial to the Court on the issues of damages and attorney fees on July 29, 1974, the plaintiff appearing in person and by counsel. M. Daniel Friedland, and the defendants appearing by counsel, Donald P. Bogard, Assistant Attorney General for the State of Indi-

ana, and the Court having heard testimony of witnesses and oral arguments of counsel now finds as follows:

FINDINGS OF FACT

1. Plaintiff filed his "Complaint for Declaratory Judgment, Injunctive Relief and Damages" as an alleged class action on February 22, 1972.

2. The named defendants were the Indiana Real Estate Commission, its executive secretary, the members of the Commission and the State of Indiana.

3. In that Complaint Plaintiffs sought damages from the Defendants in the amount of $100,000.00 and reasonable attorney fees.

4. On March 9, 1972, Plaintiffs amended their Complaint to change the damage count from One Hundred Thousand Dollars "to reasonable damages for the class."

5. On December 28, 1973, the Three Judge District Court denied plaintiffs' request that this cause be maintained as a class action.

6. Defendants filed their Answer in this cause on January 17, 1974.

7. The named plaintiff, Vijay V. Satoskar, a geophysicist, first contacted the Indiana Real Estate Commission regarding a real estate license in the Spring of 1970.

8. Mr. Satoskar sought a real estate license to supplement his income, but had no arrangements to go into the private real estate business.

9. Mr. Satoskar had one job in 1970 which took approximately one month of his time.

10. During 1970 and the first half of 1971, Mr. Satoskar spent at least one half of every working day working on the thesis for his doctoral degree.

11. In the summer of 1971, Mr. Satoskar formed Geo-Services, Inc. and has since that time spent all of his working time as president of said corporation.

12. Mr. Satoskar takes no salary from Geo-Services, Inc., although he does take expenses which have never exceeded $3,000 per year.

13. Mr. Satoskar has filed no federal or state tax returns.

14. Mr. Satoskar testified that the primary reason he seeks a real estate license is to enable him to secure leases on land for possible oil and/or gas exploration for Geo-Services, Inc. at a substantially reduced price which he could not receive if he approached the owners of said land in his professional capacity as a geophysicist or as President of Geo-Services, Inc.

15. Geo-Services, Inc. has no leases for exploration of oil and/or gas.

16. There are no allegations in Plaintiff's Complaint of individual liability on the part of either the executive secretary of the Indiana Real Estate Commission or the members of said Commission.

17. Plaintiff's Complaint was drafted and filed by the Indiana Civil Liberties Union.

18. After the Indiana Civil Liberties Union withdrew from the case at plaintiff's request, Plaintiff retained his present counsel, under an oral contract at the rate of $25.00 to $30.00 per hour.

19. The fee affidavit filed by counsel for the Plaintiff computes to an hourly rate of approximately $60.00 per hour.

20. There are no provable damages in this cause.

CONCLUSIONS OF LAW

1. This cause is a suit against the State of Indiana since there are no allegations of individual liability on the part of the members of the Indiana Real Estate Commission or its executive secretary, and no showing of any such liability.

2. The State of Indiana and the Indiana Real Estate Commission are not "persons" within the meaning of 42 U.S.C. § 1983.

3. The Eleventh Amendment to the United States Constitution bars a money recovery for damages and attorney's fees by the Plaintiff from the State of Indiana.

4. The named Plaintiff has not prayed in his amended complaint for damages for himself, but only for damages for the class.

5. The law is with the Defendants.

JUDGMENT

It is therefore CONSIDERED, ORDERED, ADJUDGED and DECREED that the named Plaintiff, Vijay V. Satoskar, is not entitled to recover damages in this cause since he has not prayed for damages for himself, but only for "reasonable damages for the class", and the class action has been denied. There are no allegations and no showing of individual liability on the part of the members of the Indiana Real Estate Commission or its Executive Secretary, and therefore, this cause is an action

against the State of Indiana, and any money recovery from the State is barred by the Eleventh Amendment to the Constitution of the United States. In addition, the State and the Indiana Real Estate Commission are not "persons" within the meaning of 42 U.S.C. § 1983.

The named Plaintiff is likewise not entitled to recover the fee of his attorney.

All of which is ordered this 11 day of September, 1974.

/s/ CALE J. HOLDER

Judge, United States District Court, Southern District of Indiana, Indianapolis Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VIJAY V. SATOSKAR, and All Others Similarly Situated, *Plaintiffs,*	)	
vs.	)	No. IP 72-C-82
INDIANA REAL ESTATE COMMISSION, THOMAS DICKERSON, Executive Secretary, WARD DUNCAN, WILLIAM SCHMIDT, CURTIS HUBER, HARLEY SNYDER, WILLIAM LONG, JAMES BOBILYA, DAVID FAIR, CARL MILLER, REX BREEDEN, DON McCULLOGH, EUGENE McCLAIN, FRED KELLY, WAYNE SMELTZER. As Members of the Board of Directors of the Indiana Real Estate Commission, STATE OF INDIANA, *Defendants.*	)	

PARTIAL JUDGMENT

The matter of the September 18, 1973, petition of the plaintiffs for summary judgment and attorney's fees with supporting memorandum together with an affidavit en-

titled "Fee Affidavit" and the affidavit of Vijay V. Satoskar heretofore filed on February 22, 1972, in support of his motion for temporary restraining order and preliminary injunction, and the issues joined therewith by the defendants' November 9, 1973 memorandum in opposition to plaintiff's motion for summary judgment; the November 9, 1973 defendants' brief on propriety of attorneys' fees to plaintiffs; and the November 9, 1973 defendants' brief on propriety of attorneys' fees to plaintiffs; and the November 9, 1973 defendants' motion to deny class action with supporting memorandum came on for the Court's ruling.

The action was commenced with the filing of the February 22, 1972 complaint for declaratory judgment, injunctive relief and damages. Jurisdiction is invoked pursuant to Title 28 U.S.C. Section 1343(3) and Title 42 U.S.C. Sections 1981 and 1983. The rights, privileges and immunities sought to be redressed are those secured by the equal protection clause of the Fourteenth Amendment and the equal protection clause of Article 1 Clause 23 of the Constitution of the State of Indiana. The declaratory judgment proceeding is pursuant to Title 28 U.S.C. Sections 2201 and 2202 seeking a declaration that an Indiana Statute IC 25-34-1-12(2) Burns Indiana Statutes Section 63-2411(2) (Cumm. Pocket Supp. 1971) is unconstitutional on its face and as applied to plaintiffs. Plaintiffs also seek a declaration that this statute denies their rights to the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States of America; a declaration that the statute is in derogation of the supremacy clause of the Constitution of the United States of America in that an immigration regulation is solely within the purview of federal regulation; and a declaration that the statute is unconstitutional as violative of plaintiffs' right to travel.

The named plaintiff is a lawfully admitted alien with a permanent visa who resided in the State of Indiana, United States of America, when the action was commenced on February 22, 1972. The named plaintiff also seeks to establish the action as a class suit under Rule 23 of the Federal Rules of Civil Procedure. The defendants are the executive secretary and the members of the Indiana Real Estate Commission of the State of Indiana as such secretary and member.

The named plaintiff was denied the right to apply for licensure as a real estate salesman by the defendants because he was an alien and not a citizen of the United States of America and because of such statute which provides:

> The Commission shall require all applicants for licensure as a real estate salesman or real estate broker to have and possess the following minimum standards to qualify for licensure . . .
>
> (2) All applicants must be citizens of the United States prior to submitting an application for licensure.

The named plaintiff alleges he suffered immediate and irreparable economic harm by being denied the right to obtain a real estate license; alleges he suffered mental anguish, emotional distress and social stigma in being denied the right to even file an application; and alleges he suffered deprivation of rights and privileges secured to him by the Constitution of the United States of America and of the federal laws. The named plaintiff prays for compensatory and punitive damages of One Hundred Thousand Dollars ($100,000.00) reasonable attorney's fees and costs of the action.

The named plaintiff prays that a declaratory judgment issue holding the statute unconstitutional and further prays for a permanent injunction restraining defendants, their agents, and successors from enforcing or otherwise applying the statute against him.

An abstention order together with certain other rulings were made by the single Assigned District Judge which were vacated on July 31, 1973 following receipt of a mandate from the United States Court of Appeals for the Seventh Circuit from an appeal in that Court's appeal number 72-1517. The members of this Three-Judge District Court were thereafter designated.

The Court finds that there is no genuine issue as to any material fact as to the factual issues of the unconstitutionality of the statute in question and the named plaintiff is entitled to a judgment as a matter of law declaring such statute unconstitutional and that defendants should be enjoined from enforcing such statute on authority of *In re Griffiths*, 41 U.S.L.W. 5143 (June 25, 1973).

The Court further finds that there is a genuine issue of material facts as to all other issues of the complaint and the named plaintiff is not entitled to a judgment as a matter of law as to such issues.

It is ORDERED, ADJUDGED, and DECREED that the following quoted provisions of the Indiana General Assembly Acts of 1949, Chapter 44, Section 11, page 129 as amended by its Acts of 1967, Chapter 356, Section 2, page 1328, and by its Acts of 1969, Chapter 418, Section 2, page 1739 (Burns Indiana Statutes Section 63-2411(2)) (IC 25-34-1-12(2)) violates the equal protection clause of the Constitution of the United States of America, and is unconstitutional:

"• • •

(2) All applicants must be citizens of the United States prior to submitting an application for licensure.

• • •."

It is FURTHER ORDERED, ADJUDGED, and DECREED that defendants as the executive secretary and as the members of the Indiana Real Estate Commission and each of them, their officers, agents, servants, employees and their successors in office be and they hereby are PERMANENTLY ENJOINED and RESTRAINED from applying and enforcing or attempting to apply and enforce, directly or indirectly the above quoted provision of such statute.

It is also FURTHER ADJUDGED that the defendants' motion to DENY the class action request of the plaintiffs be and is hereby GRANTED.

It is also FURTHER ADJUDGED that the purpose and mission of the Three-Judge District Court is at an end and the action is REMANDED to the assigned single Judge DISTRICT Court for determination of the remaining issues of the action. The defendants are ORDERED to file their answer to the complaint within twenty (20) days.

Dated this 28 day of Dec., 1973.

/s/ ROBERT A. SPRECHER

Robert A. Sprecher, Judge,
United States Circuit Court
of Appeals for the Seventh
Circuit, Designated Member
of Three-Judge Trial Court

/s/ WILLIAM E. STECKLER

William E. Steckler, Chief Judge, United States District Court for the Southern District of Indiana, Designated Member of Three-Judge Trial Court

/s/ CALE J. HOLDER

Cale J. Holder, Judge, United States District Court for the Southern District of Indiana, Assigned Trial Judge, and Member of Three-Judge Trial Court